SYKT. GUAN HOE SUZUKI SDN. BHD.

v.

KUAN MOON ENG

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C 104 OF 1985]
26 APRIL 1985

CIVIL PROCEDURE: *Action for goods sold and delivered - Judgment in default of appearance - Defendant applied to set it aside - Execution proceedings taken by plaintiffs - Defendant then sought leave to enter appearance and for setting aside of all further writs and staying of auction of goods seized by plaintiffs and for order that plaintiffs pay damages and costs.*

After the plaintiffs obtained judgment in default of appearance, they informed the defendant and gave notice of execution proceedings unless payment was effected. The defendant immediately appointed his solicitors and applied to have judgment set aside and all further proceedings to be withheld. The plaintiffs proceeded with the execution proceedings and the Bailiff seized the defendant's goods. About a month later, the defendant filed for leave to enter appearance and for an order setting aside of subsequent proceedings and a stay of auction of the goods seized. The defendant also asked for an order that the plaintiffs pay damages and costs to the defendant.

Held:

[1] After examining the affidavit evidence, the Judge held that there is no proof that the writ of service was not served on the defendant. Consequently, the default judgment was a regular judgment.

[2] There was inexplicable delay on the part of the defendant's application to set aside the judgment.

[3] There was no defence on the merits and this showed lack of *bona fides.*

[Defendant's application dismissed with costs.]

Other source referred to:
Mallal's Supreme Court Practice 2nd Edn. 13/8/3

For the defendant/applicant - K.H. Koh; M/s. Foo Nyong Tiam & Associates
For the plaintiffs/respondents - Mohd. Yusoff Shamsuddin; M/s. Yusoff Shamsuddin & Partners.

JUDGMENT

VC George J:

The plaintiffs' claim is for RM249,973.31 said to be the balance in respect of goods sold and delivered to the defendant who apparently had been appointed one of their dealers. There is also a claim for RM8,759.50 said to be agreed interest at 12% chargeable for late payment calculated up to 30 September 1984 and RM18 in respect of certain missing parts on "returned goods". The plaintiffs also claim further interest at 12% per annum on the said RM249.973.31 and on the RM18 as from 1 October 1984 until realisation and costs.

The writ was issued on 8 January 1985 and one Mohd. Izhar bin Mahmood by an affidavit of service claimed that on Saturday 12 January 1985 at No: 505, Lorong 24, Taman ACBE, Bahau, Negeri Sembilan, he had served the writ on a man who admitted that he was the defendant and who had acknowledged the service by rubber-stamping a copy of the writ which copy was exhibited to the affidavit of service. It is to be noted that there is indeed the clear imprint of what on the face of it appears to be the rubber stamp of the defendant's trading firm Chin Hoe Hin Motors.

Judgment in default of appearance was entered on 25 January 1985 and by letter dated 9 February 1985 the plaintiffs' solicitors informed the defendant of this fact enclosing a copy of the judgment and demanding payment of the judgment sum and giving notice that execution proceedings without further reference to the defendant would be resorted to unless payment was effected.

The defendant says that immediately on receipt of that letter he appointed M/s. Foo Nyong Tiam & Associates, Advocates and Solicitors to act for him. He had apparently instructed them that the writ of summons had not been served on him. By letter dated 16 February 1985 those solicitors wrote to the plaintiffs' solicitors conveying their instructions and stating that they would be applying to set aside the default judgment. They asked for a copy of the affidavit of service and asked that all further proceedings be withheld.

The plaintiff's solicitors had apparently ignored the defendant's solicitors' letter of 16 February 1985 and proceeded with execution proceedings that resulted in the goods in the defendant's premises being seized by the Bailiff of the Court on 26 February. By letter dated 1 March 1985 the defendant's solicitors expressed their annoyance at the turn of events. However it was only on 14 March 1985 that they filed their application which is encl. 9 in the Court file by which they sought leave for the defendant to enter an appearance. They also went on to ask that the purported service of the writ and all subsequent proceedings be set aside, for stay of the auction of the goods seized and for an order that the plaintiffs and their solicitors pay damages and that the plaintiffs' solicitors be made to pay the costs of the application on what appeared to be a solicitor and client basis!

As the auction was scheduled for 11.00 a.m. on 15 March the Court fixed the hearing of the application for the same day 15 March 1985 at 9.30 a.m. when Encik K.H. Koh appeared for the defendant/applicant and Encik Yusoff Shamsuddin for the plaintiffs/respondents.

Encik K.H. Koh said that the application should be heard *inter partes* and that as he had informed the solicitors for the plaintiffs of the hearing only the previous day, he suggested that the Court postpone the auction of the goods seized which was about to take place an hour or so later that morning and adjourn the hearing of the application to a later date. However Encik Yusoff Shamsuddin took the view that (since he was present) I should dispose of the application without adjourning it, which I proceeded to do.

Encik K.H. Koh relied on the affidavit of the defendant and the enclosures which included a proposed statement of defence.

The explanation given for not entering an appearance is as set out in para. 4 of the defendant's affidavit in support of his application.

> The affidavit of service ... is false and perjury in that he did not serve any Writ of Summons on me personally on 12 January 1985 at 9.50 a.m. at 505, Lorong 24, Taman ACBE, Bahau, Negeri Sembilan.

The defendant went on to depose that at the date and time that it was alleged that he was served with the writ he was in fact at the Office of the Registrar of Road Transport in Seremban and in purported support of that contention exhibited a letter dated 9 March 1985 from the Registrar to the defendant's solicitors stating that the defendant was at his office on 12 January 1985 to register the motor cycles bearing registration numbers NW7743, NW7745, NW7746 and NW7747.

I pause to note that no explanation is given as to how the Registrar could remember on 9 March 1985 that it was the defendant who attended on his office on 12 January 1985 and as to why, if those motor cycles were to be registered on 12 January 1985, the receipts in respect of payments made to the Registrar in respect of each of those motor cycle was dated 9 March 1985. In any event as was pointed out by Counsel for the plaintiffs that the defendant had attended on the Registrar on 12 January 1985 does not rule out the fact that he may very well have been at Bahau earlier on that day at 9.50 a.m. (when the writ was said to have been served on him). There is no denial of the allegation that it was the defendant's rubber stamp that was used to stamp the defendant's firm and address on the copy of the writ and no explanation as to how this came about.

I was satisfied that the writ was served on the defendant as alleged in the affidavit of service. I was satisfied that accordingly the default judgment was a regular judgment.

The Court has a discretion to set aside such a judgment but will normally only exercise it if a defence on the merits is shown, an acceptable explanation given for not entering the appearance in time and if the application to set aside is made promptly. Even where an application to set aside for irregularity is made by O. 2 r. 2, it has to be made within a reasonable time. It follows then that where there is no irregularity the Court will also expect promptness. However the lack of promptness can be excused if a reasonable and plausible reason for the delay is given.

In the instant case no explanation has been given as to why there was that delay in applying to set aside. The application was filed only on the day before the date fixed for the auction of the goods attached in spite of the admitted fact that the defendant was served with a copy of the judgment before 16 February 1985 and that the goods were attached on 27 February 1985 and auction date fixed for 15 March 1985.

As to the defence on the merits, what is required is an affidavit disclosing facts showing a defence on merits - *Mallal's Supreme Court Practice* 2nd Edn. 13/8/3. Here there was no such affidavit and in any event what was disclosed in the "purported defence" does not plausibly raise an arguable or triable issue. It reeked of sham and lack of *bona fides.* To my mind that explained the lack of a disclosure of facts showing a defence of merits by way of affidavit. The lack of a defence on the merits explains the allowing of the judgment to be taken in default as well as the delay to apply to set aside.

The application had to be and was dismissed with costs.

Also found at [1986] 1 CLJ 258